Supreme Court, U.S.
FILED
AUG 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-8

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

J. BURROUGHS, LIEUTENANT DIETRICK, PASQUALE BARONE, CHARLES H. ZIMMERMAN,

Petitioners

v.

WILLIAM F. HIGGINS,

Respondent

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LeROY S. ZIMMERMAN
Attorney General

ANDREW S. GORDON
Chief Deputy Attorney General

BY: GREGORY R. NEUHAUSER
Senior Deputy Attorney General
Counsel of Record

LAURA FREDRICKS
Deputy Attorney General

Attorneys for Petitioners

Office of Attorney General
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

TABLE OF CONTENTS

	Page
Table of Authorities.....	ii
Argument.....	1
Conclusion.....	5

TABLE OF AUTHORITIES

CASES	PAGE
O'Lone v. Estate of Shabazz No. 85-1722 (June 9, 1987)...	passim
Shabazz v. O'Lone, 782 F.2d 416 (3d Cir. 1986), rev' d sub nom. O'Lone v. Estate of Shabazz, No. 85-1722 (June 9, 1987).....	3
Turner v. Safley, No. 85-1384 (June 1, 1987).....	1

IN THE SUPREME COURT OF
THE UNITED STATES

No. 87-8

October Term, 1987

J. BURROUGHS, et al.,

Petitioners

v.

WILLIAM F. HIGGINS,

Respondent

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ARGUMENT

In the petition for writ of certiorari, we presented to the Court the reasons why the Court of Appeals' standard for the accommodation of the religious rights of prisoners conflicts with decisions of this Court -- most notably, the recent decisions in O'Lone v. Estate of Shabazz, No. 85-1722 (June 9, 1987), and Turner v. Safley, No. 85-1384 (June 1, 1987). In opposition to the petition, respondent takes the remarkable position that the Court of Appeals' decision does not conflict with O'Lone, even though the Court of Appeals expressly based its decision in this case on its own prior decision in O'Lone, which now has been rejected categorically by this Court.

Apparently, respondent would read this Court's decision in O'Lone as not incongruous with the Court of Appeals' decision in this case for two reasons: 1) the burden placed upon government officials by the Court of Appeals here is not different from the burden placed by this Court in O'Lone, and 2) the Court of Appeals here never reached the accommodation issue discussed in O'Lone. Respondent simply is wrong on both counts.

While it is true that the Court of Appeals did not expressly resolve the accommodation issue, it stated it had "grave reservations about the state's purported accommodation of Higgins' practice." (App. 21a) As we pointed out in the petition, however, these "reservations" run counter to the District Court's express findings of reasonable

methods of accommodation having been afforded to respondent (App. 41a-42a), and therefore must be re-examined under this Court's decision in O'Lone.

More significantly, however, under the Court of Appeals' standard, prison officials had the burden of establishing that their security concerns were based upon actual incidents of problems with the challenged prison policy. Shabazz v. O'Lone, 782 F.2d 416, 419-20 (3d Cir. 1986), rev'd sub nom. O'Lone v. Estate of Shabazz, No 85-1722 (June 9, 1987). Such a standard, as this Court has made clear, ignores the Court's directions that corrections officials must be permitted to forestall threats to security before problems actually occur. O'Lone, slip op. at 6. There is a difference between

identifying a bona fide concern and pointing to an actual incident. Thus, respondent cannot plausibly argue that the standard reiterated by this Court in O'Lone -- that a regulation need only have a logical connection to a legitimate governmental purpose -- is "virtually identical" to the now-discredited Third Circuit standard. (Resp. Br. p. 6) Identifying the logical connection is precisely what the Court of Appeals decided was insufficient but which this Court found to be proper in O'Lone.

CONCLUSION

For these reasons, and the reasons expressed in the petition for writ of certiorari, the petition should be granted and the decision of the Court of Appeals should be reversed summarily.

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

ANDREW S. GORDON
Chief Deputy Attorney General

GREGORY R. NEUHAUSER
Senior Deputy Attorney General
Counsel of Record

LAURA FREDRICKS
Deputy Attorney General

Office of Attorney General
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 783-1471